Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of	)	MM Docket No. 94-71
	)	
SANTA MONICA COMMUNITY COLLEGE DISTRICT	)	File No. BPED-920305ME
	)	
For a Construction Permit for a New Noncommercial FM Station on Channel 204B at Mojave, California	)	

To: The Honorable Joseph Stirmer

MOTION TO STRIKE

Santa Monica Community College District ("SMCCD") hereby moves to strike the comments of California State University, Long Beach Foundation ("CSU") on SMCCD's motion to grant its application.[1] If CSU's comments are not stricken, then, in the alternative, it is respectfully requested that consideration be given to SMCCD's responsive comments herein. In support of the foregoing motion, the following is stated:

1. As explained in SMCCD's motion, CSU did not appeal the Presiding Judge's denial of CSU's petition to intervene, and CSU therefore has no right to participate further in the instant proceeding. In its comments, CSU nonetheless proclaims that it "does not need to have its application consolidated with that of SMCCD in order to be able to intervene as a party in interest in this proceeding" and that CSU has "a right to be heard on the issue of whether the grant of the SMCCD application would be in

[1]Although styled as "comments," CSU's pleading constitutes an opposition to the relief requested by SMCCD.

the public interest." CSU Comments at 2 n.1.

2. CSU cannot fashion its own rules. If CSU believed that the Presiding Judge's prior denial of CSU's petition to intervene was in error, then CSU had ample opportunity and interest to pursue an appeal to the Review Board. Having failed to exploit that option, CSU cannot be heard to complain at this juncture about its failure to be included in any proceedings.

3. CSU's complaint about its exclusion is particularly ironic since CSU acknowledges -- as it must -- that it became aware of the Presiding Judge's approval of the SMCCD-Living Way Ministries Settlement Agreement before that approval became final. If CSU had taken timely action, the Settlement Agreement would not have become final, Living Way Ministries' application would not have been granted, and CSU would not have any cause to complain now (because SMCCD could have withdrawn its amendment).

4. CSU offers two arguments to excuse its failure to act. Neither argument has any merit.

5. First, CSU states that it did not have a meaningful opportunity to prevent the Presiding Judge's order from becoming final because, under Section 1.301, it would have had to appeal the Presiding Judge's Memorandum Opinion and Order of July 25, 1994 within five (5) days -- before CSU had actual notice of the order. CSU Comments at 6. However, the effective date of "public notice" under Section 1.4(b) of the Commission's rules is not conditioned on a party's actual notice of a decision. Moreover, CSU's options were not confined to filing an appeal under Section

1.301. CSU had actual notice of the Settlement Agreement 27 days after the approval order was released. Consequently, CSU could have filed a petition within 30 days after the release date requesting that the Presiding Judge reconsider his approval of the Settlement Agreement on his own motion, an option plainly provided by Section 1.113(a) of the Commission's rules. CSU also could have filed its petition to intervene within that 30-day period. Either course would have enabled the Presiding Judge to make an appropriate decision before his approval of the Settlement Agreement became final.

6. Second, CSU faults SMCCD for not taking action to prevent the Presiding Judge's approval of the Settlement Agreement from becoming final.[2] CSU Comments at 7. CSU's argument is, to be blunt, absurd. As set forth in its prior pleadings, SMCCD does not believe that CSU has any right to have its application considered on a comparative basis with SMCCD's application. Nothing in Commission rules or judicial precedent required SMCCD to take any action adverse to its own interest solely for the benefit of CSU.

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[2]There is no basis whatsoever for CSU's allegation that "SMCCD had ACTUAL public notice of the filing of CSU's mutually exclusive application when CSU's application was listed in an official Public Notice released to the public on July 21, 1994, Report No. 15856." CSU Comments at 6 (capitalization in original). CSU assumes -- without any factual support -- that SMCCD's representatives reviewed that Public Notice as soon as it was released and immediately recognized that CSU's application constituted an engineering conflict with SMCCD's amended application. If CSU's argument were accepted at face value, it would mean that CSU likewise had "actual" knowledge of SMCCD's amended proposal on July 25, 1994 when the Presiding Judge's Memorandum Opinion and Order was released.

7. SMCCD's petition is supported by Commission and judicial precedent which make it clear that the mere filing of an application does not, by itself, entitle an applicant to comparative consideration under Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945). See Hispanic Information and Telecommunications Network, Inc. v. FCC, 865 F.2d 1289, 1294-95 (D.C. Cir. 1989). Such comparative consideration is required if -- and only if -- the Commission first determines that two applicants are legally qualified for facilities which are mutually exclusive. The Commission has made no such determination here. Moreover, now that the Presiding Judge's approval of the Settlement Agreement has become final, the Commission is precluded from making any such determination with respect to CSU's application.

8. Nor is there any merit to CSU's claim that Section 73.3605 requires a denial of SMCCD's motion and a return of its amended application to the processing line. The few reported cases on Section 73.3605 (and its predecessor rules) make it clear that the Commission did not intend the rule to preclude a grant of applications in SMCCD's circumstances.

9. The first reported case involving that rule was Christian Broadcasting Association, Inc., 22 FCC 2d 410 (1970). In that case, the Commission granted a motion for "clarification" to allow a party (K&M Broadcasting Company) to amend an application in hearing to specify a new channel that had recently been created pursuant to a separate rulemaking. The Commission reasoned that K&M had already had its application "through the

processing line once. Hence, in these circumstances, allowing K&M's application to remain in hearing would confer upon K&M no unusual benefit . . ." 22 FCC 2d at 412. The Commission added that there were still unresolved hearing issues involving K&M and that allowing K&M to remain in hearing would avoid "a substantial delay in the implementation of service" on the new channel (because the Commission obviously anticipated a favorable resolution for K&M of those unresolved issues). Id. The Commission also noted that no other party had expressed an interest in the new FM channel since it had been allocated five (5) months earlier. The Commission decision in Christian Broadcasting Association, Inc. has never been overruled.

10. SMCCD's application poses circumstances virtually identical to those presented to the Commission in Christian Broadcasting Association, Inc. Like K&M, SMCCD filed its application first and then had to wait years for its application to be processed and designated for hearing; like K&M, SMCCD still had to face unresolved issues (the air hazard issue) after approval of the Settlement Agreement; and like K&M, a delay in the disposition of SMCCD's amended application will necessarily delay institution of service in its new community of license (especially in light of the pending freeze on the processing of noncommercial applications).

11. The absence of any other public interest in K&M's channel also presents a circumstance virtually identical to SMCCD's: unlike the newly-created channel in K&M's case, the

channel which SMCCD proposes to utilize (204) has been available for years without any expression of interest. CSU's eleventh hour effort comes too late in light of other Commission rules which clearly define the time within which Commission decisions can be reconsidered or otherwise changed.

12. Nothing in the Review Board's decision in Cabool Broadcasting Corp. is at odds with the Commission decision in Christian Broadcasting Association, Inc. Although the Board concluded that Section 1.605(c) -- the predecessor rule to Section 73.3605 -- was applicable, the Board decided to follow the Commission's approach in Christian Broadcasting Association, Inc. and allow the party's amended application to be granted because it found "that the amended applicant had been the first applicant to show an interest in the channel, that it had been processed once already, and that removal from hearing would result in a delay in service. . . ." 56 FCC 2d at 575.

13. The "clarification" and waiver granted by the Commission and Review Board in Christian Broadcasting Association, Inc. and Cabool Broadcasting Corp. have replaced whatever original intentions may have motivated the Commission in adopting the predecessor rule to section 73.3605 in 1961. The Commission itself reaffirmed that perspective in Las Americas Communications, Inc., 5 FCC Rcd 1634, 1637-38 (1990). In short, SMCCD's motion is plainly supported by current interpretation of Commission rules, precedent, and equity.

WHEREFORE, in view of the foregoing and the entire record herein, it is respectfully requested that CSU's comments be stricken and that SMCCD's motion be granted.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Merri Jo Outland, hereby certify that on this 24th day of May, 1995, a copy of the foregoing was sent via hand delivery, where indicated, or via first class mail, postage prepaid, to the following:

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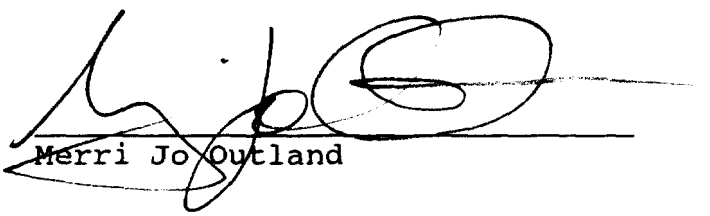

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